

Jordan Loewen-Colón ([00:00:08](#)):

Hello, and welcome to The Mapping the Doctrine of Discovery podcast. The producers of this podcast would like to acknowledge with respect the Onondaga Nation, Firekeepers of the Haudenosaunee, the Indigenous peoples on whose ancestral lands Syracuse University now stands. And now introducing your hosts, Philip Arnold and Sandra Bigtree.

Philip P. Arnold ([00:00:30](#)):

Welcome to the Doctrine of Discovery Podcast, Mapping the Doctrine of Discovery. I'm Phil Arnold, faculty member in the Department of Religion at Syracuse University and founding director of the Skä•noñh Great Law Peace Center.

Sandy Bigtree ([00:00:45](#)):

I'm Sandy Bigtree. I'm a citizen of the Mohawk Nation at Akwesasne and I'm on the Board of Indigenous Values Initiative, which is the supporting not-for-profit that supports the Skä•noñh Center.

Philip P. Arnold ([00:00:59](#)):

And we're very fortunate today to have with us Law Professor Robert Miller. Bob, thanks very much for joining us today. I'm going to let you introduce yourself to our audience.

Robert Miller ([00:01:13](#)):

Thank you very much, Phil and Sandy. I'm delighted to be involved with your podcast in this series. I am a Professor of Law at the Arizona State University, Sandra Day O'Connor College of Law. I previously... I've been there nine years now, previously taught in Portland, Oregon at the Lewis & Clark Law School for 14 years. I'm a citizen of the Eastern Shawnee Tribe of Oklahoma and almost all of my scholarship is on Indian law, legal and historical issues. And I began writing on the Doctrine of Discovery and these issues back in 2003 when my tribe appointed me to be involved with the Lewis & Clark Bicentennial. So I've been writing about the Doctrine of Discovery and researching it in depth for over 20 years.

Sandy Bigtree ([00:02:01](#)):

We hope everybody keeps tuning into our various episodes because we're approaching this topic of the Doctrines of Christian Discovery, also known as the Domination Codes from multiple perspectives. And there may be repetition and that's intentional so that you can hear it from different perspectives and see how it's permeated what we know of ourselves today.

Philip P. Arnold ([00:02:27](#)):

Thanks, Bob. So Bob has been involved with our efforts to essentially educate people around the country, around the world on the Doctrine of Discovery and he's written a number of really important books that we'll have in our show notes. And I hope that you will look up some of these really important critical fundamental texts. First, Bob, let's just start off with a softball, what is your short definition of the Doctrine of Discovery from your point of view?

Robert Miller ([00:03:02](#)):

The Doctrine of Discovery is international law that's been around since the early 1400s, and it is the legal justification for European Americans to acquire legal title and sovereignty and jurisdiction over the Indigenous nations around the entire world.

Philip P. Arnold ([00:03:21](#)):

Wow. Well that is pretty succinct. So one of the things that you have been very instrumental in helping us understand the Doctrine of Discovery and students have really appreciated your clarity on these matters. What are the 10 elements of the Doctrine of Discovery that have been really important for you to think about? Get us into this conversation.

Robert Miller ([00:03:51](#)):

As a law Professor, the law, especially criminal law and tort law, is broken down into elements. And so when I started writing my book in 2005 and it came out in 2006, as a law Professor, I tried to think, well, what are the constituent elements that make up this larger topic of the Doctrine of Discovery? So just like bank robbery, Phil, if you or Sandy were charged with bank robbery, the state must prove three or four or five elements of that crime beyond a reasonable doubt for a jury to find you guilty of bank robbery. Or if you and I had a car wreck and I charged you with negligence, there are four elements in tort law that I would have to prove to show you had been negligent for me to win a jury verdict. So I just sat around, thought about *Johnson v. M'Intosh*, read it about 30 times and tried to figure out what are the constituent elements of the Doctrine of Discovery?

([00:04:59](#)):

And I will state a 10 of them real quickly. And this is from my multiple readings of the case, and then what is actually the Doctrine of Discovery as a law Professor would look at it, as a lawyer or judge. So first discovery, Europeans claimed the right if they discovered some new island, some new land mass, and they were the first European and they claimed an automatic legal right. Second, however, and Queen Elizabeth the first in 1570s developed this principle of the Doctrine of Discovery, just because you found it first, that doesn't last forever. Your claim doesn't last forever. You have to get back within a reasonable length of time and actually occupy that area. And so that's what literally the Lewis and Clark expedition were about. President Thomas Jefferson sent Lewis and Clark to the mouth of the Columbia River in what's now Oregon and Washington now to actually occupy that site that an American had allegedly been the first Euro-American to discover it.

([00:06:10](#)):

So building a fort, building a post, building a town, having settlers there, that was how Europeans proved actual occupancy. My third element is what Thomas Jefferson called preemption and what our Founding Fathers put into a federal law in 1790 is the idea of preemption. So what did the Doctrine of Discovery mean legally? If your country was the first to show up and plant your flag and your cross and then you built some sort of town or fort there, what right did you have against other European countries? And this was called preemption. I also call it European Title. You could exclude other European countries from coming to that same place and claiming rights in those same lands. So this was a legal right, exactly what I'm saying, that you could prevent other European countries from showing up. So that's my element three. What's element number four? Well, what Indian Title... Lots of cases in the United States use the phrase Indian title.

([00:07:19](#)):

So I modified it to Native Title, Indigenous Title because we're talking about the whole world now. What right did Europeans still recognize that Indigenous nations and Indigenous peoples owned or held or possessed after European showed up? And literally Supreme Court has used that phrase a couple times. Indian Title, our US Supreme Court. What was left? My fifth element is that the Doctrine of Discovery, and again, this is taken directly from *Johnson v. M'Intosh*, I didn't make these points up. This is what Chief Justice John Marshall and the Supreme Court discusses. They just did not lay them out as 10

specific elements like I do. But the Supreme Court said tribes lost sovereign rights, tribes lost some of their commercial rights. What sovereign right does *Johnson v. M'Intosh* say the tribes lost? They lost the right to deal internationally with other governments. They were now only supposed to deal and sign treaties with England or France or Spain, if that's the first European country that arrived.

(00:08:31):

The United States has claimed that same identical right from day one of the formation of national governments that we call the United States. Indian tribes are not supposed to deal with foreign nations according to the United States, citation to authority, *Johnson v. M'Intosh*. Again, Justice Marshall also wrote that tribes lost some commercial rights because a European country signed up. They were now supposed to only trade with the country that had discovered them and had these rights, these legal powers that the Doctrine of Discovery was deemed to give. The United States adopted that same idea and still uses it to this very day. In 1792, Secretary of State, Thomas Jefferson was arguing with the British Foreign Minister about the Hudson's Bay Company and how they were taking furs from what was now US territory and they were engaging in trade with Indian peoples and Indian nations that were in the area that was now allegedly the United States.

(00:09:42):

Jefferson used an interesting phrase. He told the British Minister, "Those are our Indians and you cannot trade with them." So that to me was an application of the Doctrine of Discovery 30 years before *Johnson v. M'Intosh* opinion was written. My sixth element is contiguity. How large of an area did Europeans claim when they stuck their flag and their cross in the soil? Thomas Jefferson used this provision. Lots of Americans used this provision. That's how we claim the Louisiana Territory. I would encourage all the students to look on a map, what is the defining features of the Louisiana Territory? And then look at the Oregon country, that's where I was born and raised. What is the defining feature of the Oregon country as the world knew it? Well, it's the drainage system of the Columbia River. The Louisiana Territory was the western drainage system of the Mississippi River, and it was all based on who found the mouth of those rivers and planted their flag and their cross and claimed this Doctrine of Discovery authority.

(00:10:57):

That's that's pretty amazing when you're claiming 800 million acres because a Frenchman stuck his flag in what's now New Orleans and France created New Orleans and occupied New Orleans. So all these elements were at play in the growth of the United States, the shape of the United States today. My seventh element is terra nullius. It's a Latin phrase that just means empty earth, vacant lands Europeans claimed when they showed up and an island was empty or they claimed North America was empty, South America and then they would claim it. Now, in one sense, I want to make this point to your students. When I was a kid, we had a saying I bet you still did too, "Finders, keepers, losers, weepers." That is a principle of property law, today even. If I find a quarter laying on the street and I pick it up, I guess I should call that terra nullius, it's nobody's, I can claim it.

(00:11:59):

So that's what Europeans were claiming about *terra nullius*. I've done the research of the United States Supreme Court cases, only a few times has the US Supreme Court applied this idea of empty land to land that is now inside the United States. But this legal principle, part of the Doctrine of Discovery, was used. In fact, this terra nullius idea has been around since Roman times. So this is not a new idea. Also, since I brought this up about what we did is kids, I want to go back to my second element, actual occupancy. Another saying when I was a kid and I think everyone still knows this today, "Possession is nine tenths of the law." If I had this bike in my hand and I'm sitting on it or this book or this land, you can't claim it. So that's actually my second element and how Europeans and later Americans applied this.

[\(00:12:58\)](#):

If we are here, we have a town, we have a fort, obviously we can exclude you. My last three elements I'll go through quickly, they all start with a C. But conquest, Europeans applied the law of war, which is another international law principle that also developed in the 1400s and the 1500s. The Doctrine of Discovery, don't forget, is one of the earliest forms of international law. And it developed around the same time that the law of the sea did, the law of the ocean, who can travel where and the law of war. So conquest was very much a part of the Doctrine of Discovery. If King A defeats King B or Queen B, King A acquires all the publicly owned lands of that king and could now govern them and the United States and every European country applied this same principle to Indian nations. If we beat Indian nation X in a war, then the conqueror claimed the right to take all the public lands of the Indigenous nation.

[\(00:14:12\)](#):

Christianity, my ninth element. I don't even have to belabor this, do I? Christianity was used by Europeans and then later by Americans to claim superiority over Indigenous nations, to claim that God intended the European or United States to own these lands. What in fact do we call American Manifest Destiny, folks? And in fact, that's the longest chapter in my 2006 book, is equating manifest destiny to the Doctrine of Discovery by using my 10 elements. So I think my 10 elements are very valuable in analyzing both law, but seeing how governments historically apply these ideas and these principles to just strip away most of the rights from Indigenous nations and Indigenous peoples. And my 10th element, Sandy and Phil, is civilization.

[\(00:15:10\)](#):

All Europeans and the United States have used that. They still use that to this very day. Somehow white Christian Europeans/Americans are superior to Indigenous peoples. I started to say, what? The red man, the Brown man, the yellow man, white Europeans still use this idea of civilization. So I'm sorry if I went on too long, but those are my 10 elements. That's how I broke the Doctrine of Discovery down because of reading *Johnson v. Macintosh* so many times. And that's how I have analyzed the application of the doctrine in Australia, New Zealand, Chile, Brazil, and my most recent article, *How Europeans use the Doctrine in Africa*.

Philip P. Arnold [\(00:16:00\)](#):

It's fantastic.

Sandy Bigtree [\(00:16:02\)](#):

Right.

Philip P. Arnold [\(00:16:03\)](#):

Thanks, Bob. You didn't go on too long. It's a terrific way to begin this conversation really.

Sandy Bigtree [\(00:16:11\)](#):

But those 10 elements also are connected to civilizing the world and creating a Christian dumb around the world because it really emanates from the church in-

Robert Miller [\(00:16:23\)](#):

Absolutely. The Papal Bulls of the early 14 hundreds. And my element nine is Christianity without any question, the domination, the dominance of that one religion over every other race, every other religion, has been the key factor. I'd like to make [inaudible 00:16:41]. Let me make just one more point.

Sorry. A lot of these elements aren't just from 500 years ago. I hope the students are, and the audience is well aware that Russia planted its flag on the bottom of the Arctic Ocean at the North Pole on August the second, 2007. It sent a submarine, two and a half miles below the surface and stuck a metal Russian flag. China sent a submarine to the bottom of the South China Sea in August 2010, and again stuck a flag on the bottom of the South China Sea. China is building up islands in the South China Sea and placing soldiers on them, building buildings, building airstrips.

(00:17:27):

This is funny. It looks odd to be doing such a thing that looks like it's from the 15 hundreds, but they are very plainly echoing this 500, 600 year old international law doctrine. I found at first, I claimed it, I'm occupying it. Why did Russia put its flag at the bottom of the North Pole? Well, because 25% of the Earth's known reserves of oil and gas are located there. Why is China, the Philippines, Vietnam, Japan, why are they arguing over the South China Sea? Well, China wants to control shipping lanes there. They don't want other nations using those lanes. The US has contested this a little bit. If the audience has been really watching the news, there's been some close flights by jets, there's been some close ships, military ships sailing close to each other. So to me it's like, my gosh, we're looking at Columbus again.

(00:18:28):

We're looking at these people putting their flag and their cross in the soil. This is going on in the world right now, Sandy and Phil, and I just wanted to tell you that two weeks ago, Canada and Denmark finally settled their claims to Han Island, H-A-N, a small island in the Arctic. They've been sending their ministers there by plane and helicopter for decades. They go ashore and raise the Canadian flag or they raise the Danish flag, they leave bottles of schnapps or whiskey. And it's almost been a comedy routine, but they are echoing the Doctrine of Discovery and this claim. And I just want to pose this last hypothetical question. What did the US put on the moon in 1969?

(00:19:22):

We brought those moon rocks home and you can literally read a case out of the District of Columbia Federal Court of Appeals in 2000, contesting ownership of those Moon rocks, at least one of them. And the United States was claiming ownership because we went up there, we got it, we brought it back, it obviously belongs to us. So it's unique to see... I think I just gave you four examples of a modern day application of some of the elements of the Doctrine of Discovery.

Jordan Loewen-Colón (00:19:57):

Do you need help catching up on today's topic or do you want to learn more about the resources mentioned? If so, please check our website at [podcast.doctrineofdiscovery.org](http://podcast.doctrineofdiscovery.org) for more information. Now, back to the conversation.

Philip P. Arnold (00:20:14):

One of the most captivating things about your 2006 book was how Thomas Jefferson was so well studied in this kind of law. What is it called? The extinguishment of Aboriginal title. He was expert in that kind of legal activity well before he was president or involved with the United States. And how in the Louisiana purchase, I think you said that what the United States bought was not the land itself, but the conquest rights essentially, to that enormous piece of land. So then the Lewis and Clark expedition became a kind of necessary feature to promote this idea of taking possession, giving medals to Native American Chiefs, these enormous metals that you can find in the Library of Congress and other places, Smithsonian. And then also, as you said, marking the... Founding the fort at the mouth of the river. I found that to be a very illustrative of what the Doctrine of Discovery and how it's active and as you say, still at work today.

Robert Miller ([00:21:47](#)):

Yes, Thomas Jefferson, most people maybe aren't familiar, but he was a lawyer. He worked full-time as a lawyer from 1767 until 1774 when he became a full-time politician. There are two books about his practice of law for those seven years. And at least half the cases that he handled as a lawyer were land claims. Virginia settlers to lands, they were tracing it back to Indian Title. He was then tracing it back of course to the Doctrine of Discovery and when the Commonwealth of Virginia acquired the underlying title. Alexander Hamilton was an attorney. In 1786, he represented the State of New York in a boundary dispute against the State of Massachusetts. And you can read in the papers of Alexander Hamilton, the trial exhibits he had prepared for that trial and he went clear back to the Papal Bulls. He knew this international law.

Philip P. Arnold ([00:22:49](#)):

Oh, that's fascinating.

Robert Miller ([00:22:50](#)):

Yes. This was nothing new to them, just the title is new. They used the word preemption. And so I'm glad, Phil, that you brought up the Louisiana territory. Jefferson knew exactly what he bought from France. It was the discovery claim. The preemption claim that France could exclude any other European country from going there, and now that the United States signed this treaty, paid this money to France, we had purchased this preemption power, the Doctrine of Discovery.

Philip P. Arnold ([00:23:23](#)):

Fantastic.

Robert Miller ([00:23:24](#)):

I want to make just one more point. Jefferson lived until 1826. So he lived three years *after Johnson v. M'Intosh* was written. Your audience may not know that he and John Marshall were fourth cousins. Now they were completely opposite politically. John Marshall was a federalist appointed by George Washington. Jefferson became, I guess, we called him a Republican at the time, Republican Democrat I guess, maybe almost an anti-federalists. He critiqued often Marshall's opinions from the court. I cannot find that Thomas Jefferson ever wrote one single word about *Johnson v. M'Intosh*. So as I mentioned in my book then I assume that means he agreed with it completely and so he had nothing to write about to object to it. Well, of course he agreed with it, because he understood all these principles. Through Lewis and Clark, like you just mentioned, he tried to enact several of these other elements of the doctrine to solidify the United States' claim to the Oregon country.

Philip P. Arnold ([00:24:30](#)):

Wow.

Sandy Bigtree ([00:24:31](#)):

Well, there's some speculation that John Marshall made it all up. There wasn't really clear line that he was following the doctrines of discovery, going back to the Pope that he had elaborated on it to codify domination in the Americas.

Robert Miller ([00:24:54](#)):



I don't know who you're thinking of who's written that or that isn't how I meant to say that. I've not read that because my reading of *Johnson v. Macintosh* is that he did not make anything new up. He literally writes in his case briefly, but he references some of the Papal Bulls. He references what England, France, Holland, Spain, and Portugal had been doing since the 1400s.

(00:25:21):

So my take on this is that he was just applying to Doctrine of Discovery to the United States. And I want to make this point clear. Most people, they look at the date of *Johnson v. M'Intosh*, but the *M'Intosh* case is about land purchases that were made in 1773 and 1775 before there was any United States. So literally what that case is about is British law and what was the rights of a just private individual to buy land allegedly directly from a Chief out in the woods of what's now Illinois. And so I think that proves what I think there's just almost no question that Marshall was looking backwards at 400 years of international law. And so my point that he was applying British law at the time is very significant. He was looking at what the law was internationally.

Philip P. Arnold (00:26:28):

I think Sandy was referring to Lindsay Robertson and our conversation with him. But you are giving us a much kind of broader... By bringing in Thomas Jefferson, a much broader kind of worldview of the Founding Fathers, if you like, going back into the colonization period. So that I think is very helpful. I mean, what we're dealing with here and what we're dealing with in, as you were illustrating, in these recent cases of taking possession underneath the sea and different islands, the remote islands and things like that, what you're describing is a worldview. You're describing a worldview that is legally bound up with the canonical law, the history of legal jurisprudence that comes right out of the Vatican, I mean, in many ways.

(00:27:35):

So the melding of Christian history with legal history I think is a real important point here. I wonder if you had anything to say about that or admittedly, I'm not an expert in European history expert, you're not an expert in Christianity or Christian history, but nevertheless we are talking about something that is melding into a worldview here that turns into discovery and conquest, if you know what I mean. I wonder if you had any insight on how the law becomes an outgrowth of this, what we call Europe now, but really is Christendom, right? And how those two realities for us today are kind of one in the 15th century.

Robert Miller (00:28:36):

Yes, I've written about this, my two articles in 2011, I co-wrote an article with a student of mine, but she was from Brazil. So she did the research in the Portuguese language, Brazil legal materials. And we used my 10 elements to look at Portuguese law in Brazil. We didn't study. Yeah, by no means do I claim to be any kind of expert on the law of Portugal in Spain. We looked just at the application of their claims to colonization and domination in what's now Brazil, and then I wrote an article with two other Professors, one from Chile who is a law Professor in Chile. So in 2011, I published these two articles using my 10 elements and then analyzing what Brazilian law is today and Brazilian history and what Chilean law and history is today. They used these 10 elements. And what I would claim and what I wrote certainly in the article about Spain, Spain is even more of a legalistic society, I think, than is the Anglo-American common law system.

(00:29:51):

Now for your audience, Europe developed a common law system that we adopted from England in which courts can make law. The Civil Law System defined in the continent of Europe, courts don't make law, only legislatures, assemblies, kings can make law. And so my research about Spain, I was blown away by this because I had no experience with this before, but the Spanish were far more legalistic and enacted regulations about colonization, passed laws about colonization, debated the rights of Indigenous peoples. Bartolome de Las Casas and another minister of the King named Sepulveda in the 1530s I believe, had an enormous debate whether American Indians, and now they're talking about in the Caribbean and Central and South America, were Indigenous peoples there human beings? And did they have rights? And the King got so concerned about it, he ordered the drafting of the *Requerimiento*, which is a Spanish word that just means the requirement.

(00:31:03):

And his conquistadors, and I think this... I'm going by memory now from my 2011 article, but I think that was drafted in 1513, the king developed an administrative agency to write this document and his conquistadors had to read it to the Indigenous peoples. "We're here, God sent us, the King of Spain sent us, You can be subject to us now or we're going to kill you." That's pretty much what it said. But legalistically, the King and Spanish law said we had to give this notice. And so that's even more than anything I ever encountered in Anglo-American law. So I really think the Spanish... Portugal is very similar, but they never had anything like the *Requerimiento*. But the Spanish conquistadors were so afraid that the local Indigenous peoples might actually convert to Christianity and become a subject to the King, that they would read that document from their boat, they would read that document to the land they called it, the phrase they used was speaking into their beard.

(00:32:17):

They would just mumble and then they'd tell the King, "Yeah, we read them the *Requerimiento*, then we killed them and took every piece of gold." Anyway, I digressed a bit. So anyway, my two articles in 2011 and now this brand new article took me over a decade, just came out a few months ago about how Europeans divided Africa and I focused on East Africa. These 10 elements are used repeatedly. Americans attended... I'm getting ahead of myself, sorry. In 1885, von Bismark, the Prime Minister of Germany called the Berlin Conference to decide how to divide up Africa. 14 countries attended, 13 European countries and the United States. I was always stunned and surprised, why was the United States at this Berlin conference? So you're just going to have to read my brand new article. But in a thumb shell, the Americans were there to tell Europeans how the US had colonized Indian nations.

(00:33:29):

And the US representative gave several speeches and in private meetings, was giving advice. But I of course was looking to see if this Berlin Conference used my 10 elements. And then they wrote a treaty, the Berlin Act, ACT it's called, in February of 1886. And they pretty much divided up Africa. They pretty much used most of these 10 elements that I defined the Doctrine as being. And then I looked at just East Africa, Kenya, Tanzania, and Uganda, because those are three countries today that were colonized by the Germans and the English. So once again, I did a international comparative law kind of thing but from the vision of the elements of the Doctrine of Discovery, it is international and it was and is international law.

Philip P. Arnold (00:34:24):

Wow, that's fantastic. So it starts off as international law, right? Something like in the 15th century, it's the Law of Nations or something and then it morphs into this Protestant nation building project in the US Supreme Court. But maybe it always was an international effort, maybe it always was, and now it's the kind of... Well, now it's being just much more explicit about being an international framework.



Robert Miller ([00:35:09](#)):

Yes. It very plainly came from the Catholic church, and I think I write this in my 2006 book. So Queen Elizabeth the first was it excommunicated, as most of the audience must know, Henry the 8th made his own religion really, the Church of England. He broke away, I think he was excommunicated himself and then wars ensued. They hated each other for hundreds of years. But when it came time to divide up the rest of the world and to steal the lands and assets of Indigenous peoples, the Protestants and the Catholics got my element one. But she added this element two, if you don't get back there within a reasonable time and re-actually occupy it, then it's available for us, the English or us, the French, to claim.

Philip P. Arnold ([00:35:57](#)):

Yeah. Wow. We know that your forthcoming book is coming out a promise kept and it's about the *McGirt* Decision. And I wonder if you could give us a little... How that is connected to what we've been talking about in this podcast, or is it, I guess?

Robert Miller ([00:36:22](#)):

Well, I hadn't given that much thought. I mean, obviously Oklahoma's part of the United States, obviously the United States claims the whole area. Why does the United States claim the whole area? Because of the Doctrine of Discovery, because of the Louisiana purchase. Sandy mentioned this earlier, and I want to repeat this for your audience. Thomas Jefferson knew what he bought from France. It was only this power of preemption. My element three, what we could would also call European Title. That's all France had to sell. France was not in physical possession of any lands in the Louisiana Territory. There were a few little towns, New Orleans, St. Genevieve, St. Louis, but there weren't a whole bunch of Frenchmen out there. So Jefferson writes to the congress that we now must buy these lands from the "native proprietors." Well, I looked up what the word proprietor meant in 1808, and it means the same thing it does today.

([00:37:28](#)):

Jefferson understood that the Indian nations still held my element number four. They still held the Native Title, the rights of occupation and use of their lands, which is a very valuable property right in Anglo-American law. So I want you to understand that property rights can be held by different people. One acre of land can be owned by multiple people and in different ways under Anglo-American, English-American property law. And so Jefferson knew that we had bought from France the overarching preemption right, the Doctrine of Discovery right. These tribes, if they ever wanted to sell, could only sell their land to the United States. And there are treaties I cite in my book in 180... In the Jefferson administration. That said that if the tribe ever wanted to sell, it could only sell to the United States. That is evidence of the Jefferson administration using the Doctrine of Discovery.

([00:38:38](#)):

And let me give you a fact that very few people know, I think. So we paid France 15 million dollars for the Louisiana Territory. Every American history book is wrong because it claims the US bought that 800 million acres for 15 million dollars, 3 cents an acre. That is totally false. That's proven by a 1947 law review article by Felix Cohen. And I mentioned it in my book as other people do, the United States later bought the land directly, bought the Indian Title from the Indian Nations. And in fact, the United States signed over 100 treaties with tribes in what's in the Louisiana Territory in subsequent decades, and paid those tribes over 300 million dollars for the Indian Title to the lands those tribes seated through their treaties.

(00:39:43):

Now, those statistics I'm giving you are from Felix Cohen's 1947 law review article. Felix Cohen's the most famous Indian law scholar in United States history. And don't forget that those hundred tribes still have reservations in those area, maybe a hundred million acres. I'm just guessing that each tribe has roughly 1 million acre reservations. Some have bigger, some have tiny ones. But the United States still recognizes Indian Title to lots of lands in the Louisiana Territory today, same as the Oregon country, same as the American Southwest. So these principles of property law and Doctrine of Discovery still apply in the United States to this very day.

Philip P. Arnold (00:40:32):

We're kind of morph... I mean, of course what we're describing here in terms of a worldview is completely different than an Indigenous perspective, right? Now, the Indigenous peoples had no concept that their earth could be owned, still don't in many ways. So there's a couple of things that I'm interested in here. First, the clarification of the Doctrine of Discovery has become really fundamental in Indian country. Not just that, but also amongst students, when they get hold of this idea of the unity of the whole phenomenon of property through discovery and conquest and white supremacy, we'll just say it that way, right? So these things coming together in religion and law has been very clarifying for our students. I think probably you have the same experience, Bob. So there's that. That somehow today the Doctrine of Discovery is being deployed as a category to clarify many problems in our world that have kind of come out of this legacy.

(00:41:51):

And the second thing is, what do we do about it? What do we do about the Discovery Doctrine? What do we do? How should we move forward? Because I think we can all agree that environmental degradation of the disenfranchisement of Indigenous peoples and their value systems, essentially their traditions and languages, et cetera, has been catastrophic. So part of what we're doing this for is to find some remedy. And I wonder about those two things. Why Doctrine of Discovery has become so important as a kind of teaching tool as a kind of clarifying way of understanding an American history or world history, and then second, what are we going to do about it? Is there something that can be done? Or is it just so ingrained in our culture in a way, that it cannot be rectified?

Robert Miller (00:42:58):

Those are enormously important and enormous subjects you brought up. You could have entire shows just debating back and forth everything you just said. Let me make one point, because I'm maybe pushing back a tiny bit on this. Yes, Indigenous peoples did not perceive of the earth of being owned. I was just visiting in New York City and I saw an exhibit in a museum about, did the Dutch really buy Manhattan for \$24 a beads? Well, even in that exhibit, the point was Native peoples didn't perceive of selling land in that way. What did they think the Dutch were giving them and what for? Because I literally have read that practically the day after allegedly buying Manhattan, Indians were hunting on the lands and the Dutch were going, "Hey, you have to leave. We bought this from you yesterday." And the native people looked at him like, "What?"

(00:44:00):

But I do want to make this point, Phil, and would love to talk with you two about it. Every tribal nation recognized its boundaries. It knew its hunting grounds, its fishing locations. It protected those places. It fought sometimes against other Indigenous nations to either protect or even sometimes to expand the Black Hills itself, I think it's controversial to even say this, but I think historically one Indigenous peoples took it from another. I'm not an expert on that, but property rights were understood by Indigenous

cultures, just not in the same way that European Anglo Americans use this fee-simple, absolute idea. I wrote a book in 2012 about American Indian economic development. Longest chapter in that book was to show that tribal peoples do recognize property rights. Native peoples in most tribes was the women, were the farmers, they knew which field was theirs to use.

(00:45:12):

They maybe didn't perceive that they owned it in fee simple for the rest of time. But they and their family owned these fields, they used them, they owned the produce, they did with the product what they wished. We've talked Lewis and Clark a couple times when they spent the winter of 1804, 1805 in what's now North Dakota near the Mandan Villages. They tried to buy corn from the men and the men went, "Hey, no, we don't own the corn. Don't get us in trouble. The women are the farmers. You buy the corn and squash from the women." So the idea of private property was understood by most tribal cultures who own... You owned your horse, you owned your clothes, you owned your housing, you owned your pots and pans and your firearms, bows and arrow. But land was seen as a communal ownership of the nation?

Philip P. Arnold (00:46:08):

But the exchange was not in monetary terms, it was not a state sponsored economy. It was a gift economy that would've been between different nations, different individuals or between human beings and the earth itself as a living being. So the notion of property that we're talking about that comes out of Europe is one in which the earth is mute, the earth has no agency. And so I think that becomes a different worldview that they're operating in. So when the Dutch are in New York, they give them beads, the native people are saying, "Well, this is a gift. This is a gift for you to be among us for a while, for a time or whatever." But the Dutch understood it in terms of the hierarchical structure of the monarchy or some other kind of hierarchical structure in which the earth itself does not have any agency in that transaction. So I think there are important differences, but I think you're also right that there is an acknowledgement of certain borders, certain regions, there are no fences for example, there may be natural borders between different nations of the Haudenosaunee for example.

Sandy Bigtree (00:47:36):

Well, the land determines identity and it's through your clans, so it's this interactive relationship that's regenerative actually. And where you tap into this regenerative force of the earth. So these boundaries were very much involved in your relationship to the land. When the French Jesuits came into Onondaga territory in 1656, they arrived with a deed to 600 square miles of land. There was no exchange, they didn't sell it, the Haudenosaunee didn't exchange it for anything. They just came and took it. And what they were trying to do is unify the Confederacy to ally with the French so they could fight against the British. We have that narrative in our center, Orin sees the plaque that was established with the first county fort. It's got Indians with dew and headdresses, even though this took place in 17th century. And you've got the Jesuits coming in and planting crosses and...

Philip P. Arnold (00:48:45):

Planting crosses and flags.

Sandy Bigtree (00:48:47):

... And flags. And Orin's comment was they were planting crosses and flags and we were planting corn.

Robert Miller (00:48:56):

Yeah. I don't disagree with anything you both had just said and some of it is a bit new that I haven't even thought about, so there was no question there was a vastly different property rights regime, vastly different world view and of the value of the earth. European saw it as a mon... Still do to this day, see it as a monetary object to get the best and highest use. There's a phrase from American property law, "Turn land to its best and highest use." But if you want to live on that land for the next seven generations or couple thousand years, European Anglo-American views are the best and highest use we would call raping the land and destroying where you're going to live, look at Onondaga lake. I've read just a tiny bit about that. You folks know far better than me. So yes, I agree with most of what you said. Well I agree with all what you said. I just haven't given great thought to some of the points.

(00:49:59):

But vastly different property rights regimes, but that does not mean Indigenous peoples didn't recognize lands, understand its use and use it. Here in the Pacific Northwest, Native people's owned fishing rocks, they built wooden platforms to fish from, and those were owned by men passed to their children by inheritance rules. Out here in the Pacific Northwest and in the Southwest, Native women would own pinon trees. They would be perceived as owning berry patches. They would tend them and scare off the deer maybe. And they would leave those through well understood inheritance laws to their daughters. So we did have a property regime, it was vastly different from the European American system.

Philip P. Arnold (00:50:47):

Yeah, I think that's really helpful because obviously Indigenous people, one of the defining characteristics has been in the same place for a very, very long time. And so they have these traditions that were completely erased by this Discovery Doctrine in so many ways. And I mean, to get back to it a little bit, I perceive that one of the things you're doing is you are collaborating with so many different international lawyers, Indigenous peoples around the world as a way to get back to this legacy, to create a critique of this legacy of the Doctrine of Discovery. And I wonder, could you talk a little bit about what's going to be happening with you in these other kind of collaborations you're working on around the 1823 anniversary? Or the 2023 anniversary of *Johnson v. M'Intosh*? What kinds of things are you looking forward to or thinking about right now?

Robert Miller (00:52:04):

Yes, I knew the 200 year anniversary was coming up, I haven't planned anything special. I'm working with someone that you both know on a film. So that's been in the works for a while. My article on Africa just took me a decade to write because I didn't have someone to write with. Literally, I used a student because I can't learn a foreign language overnight and I don't know the history of other countries. And so I've tried to work with local people. So my 2010 book, I co-wrote it with Indigenous Professors from Canada, New Mexico, excuse me, Canada, New Zealand and Australia. And we used my 10 elements to look at the history and law of all those four colonies and how England used the Doctrine of Discovery. So then my article about Brazil was when I got this student who was Portuguese, Brazilian. And the article on Spain came from a collaboration with two Spanish speaking people, one who was a Professor in Chile.

(00:53:12):

And my recent article on Africa took me over a decade to write because I didn't know any foreign languages. And I got a student who's fluent German speaker, was born and raised in Austria. So she did the German language research. Literally, Phil and Sandy, last week I sent an email to somebody who's a Professor in Finland and I said, "You should write an article about the Sami people and the Doctrine of Discovery." I did have a student who could speak a little Swedish, so about five years ago I started an

article on Sweden and that didn't pan out. But this is why I've partnered with people and I would like to write more about Africa because that's why we focused just on East Africa. At least seven European countries had colonies in Africa. So that could all be analyzed in different regions of Africa, or I really would like to see something out of the Sami people from Norway, Sweden, Finland and even Russia. So it's international law, guess what? It was applied around the whole world.

Sandy Bigtree ([00:54:27](#)):

Absolutely. But then many of the Sami identify with being Christian. And if you look at the culture of Christianity, it's all based under a hierarchy that you're born into sin and it's through the dominance of the church that you can attain salvation. So just beginning with that premise, it's in total opposition to an Indigenous sense of being in the world. So many think they can weld the two, but they're in opposition of one another.

Robert Miller ([00:54:54](#)):

Well, then maybe this analysis would be more important for the Sami then, what you just said.

Sandy Bigtree ([00:55:00](#)):

Mm-hmm.

Philip P. Arnold ([00:55:01](#)):

Yeah, no, it is-

Sandy Bigtree ([00:55:02](#)):

And the Lithuanians as well. Indigenous Lithuanians are going through the same thing. They still strongly identify with being Christian, but that whole framework keeps you... You're born in sin. How do you rectify that?

Philip P. Arnold ([00:55:16](#)):

Just to elaborate on what Sandy's saying is we're working with some people in Norway on this topic, not in the legal sense, much more kind of from the religion angle and they have a Truth and Reconciliation Commission going on right now in Norway, essentially trying to solve the issues around boarding schools among Sami people. And these were largely run by the Lutheran church or some derivative of Lutheranism, but many of those... But the Truth and Reconciliation Commission is largely run by very Christian conservative Sami people. So we have then this kind of problem built in, and one of the things that we're trying to do is put together a conference in Norway, in Oslo, that would discuss the Doctrine of Discovery because it becomes a kind of clarifying issue because then what does truth and reconciliation mean outside of say, a Christian setting or a Christian organizing principle? So anyway, this goes to the thing I had asked earlier, the whole educational value of the Doctrine of Discovery of kind of it becomes a way of interrogating history in a whole new way, I think.

Robert Miller ([00:57:01](#)):

But let me encourage you then, please get some attorneys, Professors from up there, because don't forget the legal aspect. This is a law and it's a justification for, yes, domination, for stealing lands, for stealing assets, but the tiny bit of research that my student and I did, there were cases out of the Swedish highest courts. And so now I need someone that can speak Danish and I need someone for

Finnish. But if you could get some, it just adds so much to the story, Phil and Sandy, it's not just religion, it's history, it's legal history and the law was used to justify this horrific history.

(00:57:47):

And that same thing in the US, so I think it adds an enormous dimension to that and man, with you guys making these kind of contacts, please get somebody from up there to do the legal analysis of their case law. What happened to reindeer herding up there? What happened to land? What happened to fishing rights? They were all... I mean, I only know a tiny bit about it, but I assume they were all taken the same way they were here in the United States from our Indian Nations. So I have tried to find somebody from the Sami world. I mean, they don't have to be Sami, but man, if you could find a Sami lawyer, Sami Professor, I would think they would be so intrigued to look at the law and how the courts have helped strip away the rights of Indigenous people. That's how the international law has been used.

Philip P. Arnold (00:58:40):

Yeah, yeah. No, that's a great suggestion. I think we'll have to look into that. I mean, I think they're just beginning to look at this history in many ways in Scandinavia, but it is a clarifying issue. That's all I wanted to say. This whole issue of the Doctrine of Discovery becomes so clarifying in many ways.

Robert Miller (00:59:06):

Well, let me tell you what I learned through the Lewis and Clark Bicentennial. So my tribe appointed me to be a part of that big national commission. I was just on the part called Circle of Tribal Advisors. We were advising the larger Bicentennial Commission. But these people that were so interested in Lewis and Clark, they literally Clarkies if you're really a aficionado of Lewis and Clark, but they were so both stunned and interested to see that what Lewis and Clark were doing had a legal application. And so the church history you're looking at there in Scandinavia and the history and boarding schools and all that stuff, it had legal objectives too, and was justified also by the law, and that's just at such an illuminating, a new way to look at it.

(01:00:08):

The history developed because of law. The governments did certain things because of what they perceived the law allowed them to do. And that's the pernicious effect of the Doctrine of Discovery. It justified the greed of what European leaders wanted. Get all the land, get all the gold, get all the timber, get all the assets, put land on the best and highest use. Wow, I said that sarcastically, I hope the audience-

Sandy Bigtree (01:00:39):

Right.

Philip P. Arnold (01:00:43):

Well, look, what we've demonstrated here is the importance of collaboration, collaborative work, cross disciplines, cross cultural, all kinds of things. I really wanted to thank you again, Bob. We'll look forward to your fourth coming book on the *McGirt* Decision, I think. I hope you talk more about connecting that to the Doctrine of Discovery but we'll see, I guess, huh? So I want to just thank you again for being with us today, and I learned a lot from this conversation.

Sandy Bigtree (01:01:28):

Mm-hmm. Thank you.



Robert Miller ([01:01:29](#)):

Thank you for inviting me. I'm delighted to be involved.

Jordan Loewen-Colón ([01:01:41](#)):

The producers of this podcast were Adams DJ Brett and Jordan Brady Loewen. Our intro and outro is Social Dancing Music by Orris Edwards and Regis Cook. This podcast is produced in collaboration with Henry Luce Foundation, Syracuse University's Department of Religion and the Indigenous Values Initiative.